APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 80-1561

Jesse J. Ford,

Appellant,

v.

Robert F. Parratt, Warden,

Appellee.

On Remand from the United States Supreme Court.

Filed: March 15, 1982

Before HEANEY, ADAMS,* and STEPHENSON, Circuit Judges.

PER CURIAM.

This matter is before the Court pursuant to a remand from the United States Supreme Court. In that mandate, we were asked to further consider the case in the light of *Sumner v. Mata*, 449 U. S. 539 (1981). We have done so

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*The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

and revise our opinion to permit the state court to reconsider the matter if it wishes.

Jesse J. Ford raised three issues before the United States District Court in his habeas corpus proceeding: (1) that Ford's plea of guilty was induced by threats and promises; (2) that the state trial court's failure to comply with *Boykin v. Alabama,* 395 U. S. 238 (1969), requires that the plea be vacated; and (3) that Ford was deprived of the right to effective assistance of counsel.

> The district court denied relief on issue (1) stating: Pursuant to 28 U. S. C. § 2254 (d), a presumption of correctness attaches to state court determinations evidenced by a written finding after a full and fair evidentiary hearing. Once the presumption is properly invoked, the habeas petitioner bears the burden of proving by "convincing" evidence that the state court finding was erroneous. • • • In the present case, Ford does not allege any of the exceptions (42 U. S. C. § 2254 (d) (1)-(8)) to invocation of the presumption of correctness and appears to have been afforded a full and fair hearing in state court. The testimony presented to the state post-conviction court was conflicting and that court's finding that no promises or threats were made to induce the guilty plea is fairly supported by the record as a whole. Accordingly, this Court holds that the state post-conviction court's finding that no promises or threats were made is entitled to a presumption of correctness and that Ford has not shown this finding to be erroneous. [Citation omitted.]

This issue was not raised on appeal.

The district court denied relief on issue (2) on the ground that the record developed at the arraignment, plea hearing and post-conviction evidentiary hearing disclosed

that Ford's guilty plea was voluntarily and knowingly entered. We did not reach the *Boykin* issue on appeal.

The state court made only a brief comment on the third issue—the alleged ineffectiveness of petitioner's counsel:

> The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion.

The district court also denied relief, stating:

> The principal argument presently advanced by the petitioner is that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape. • • •
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> In reply, the state asserts that Ford did have the effective assistance of counsel, but first contends that Ford failed to exhaust his state remedy as to this claim on the grounds now alleged.
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> • • • •
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> The state argues that the question of whether Ford's counsel *investigated* the rumored pregnancy was never before the state court as a reason for Ford's allegation that his counsel was ineffective. Therefore, the state maintains, Ford has not exhausted his state remedies as to that issue. • • •
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> • • • •
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> First, while the clear emphasis of Ford's claim in the state courts was on the alleged promises and threats made to Ford by his attorney to obtain a guilty plea, the general issue of incompetency of counsel was raised and the Nebraska Supreme Court specifically found that "the defendant was represented

by competent counsel throughout the original proceedings." *State v. Ford*, 200 Neb. 779, 781, 265 N. W. 2d 456, 457 (1978). Second, even if the theory of ineffective counsel presently advanced by the petitioner was not adequately presented in the state courts, no remedy is now available to the petitioner in the Nebraska courts. Under Nebraska law, after a first motion for post-conviction relief has been judicially determined, a petitioner is precluded from raising in a subsequent motion for post-conviction relief any grounds which could have been raised in the first proceeding. *State v. Newton*, 202 Neb. 361, 363, 275 N. W. 2d 297, 299 (1979). • • •

From the record in the instant case, it does not appear that Ford has deliberately bypassed state procedures and the state has not so alleged. The burden of pleading and proving a deliberate bypass is on the state. *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974), *cert. denied*, 420 U. S. 912 (1975). Accordingly, even if the theory of ineffective counsel presently advanced by Ford was not adequately presented to the state courts, under the circumstances of this case the exhaustion doctrine does not prevent review of that claim in this habeas proceeding.

• • • •

[T]his appears to be a case where "the petitioner must shoulder an initial burden of showing the existence of admissible evidence which would have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." *Accord, United States v. McMillian*, 606 F. 2d 245, 248 (8th Cir. 1979). Here, the petitioner has not only failed to show that an investigation would have established that the victim was not pregnant, but also how the non-pregnancy of the victim would have aided him in defending the charge of rape. [Emphasis included.]

When issue (3) reached this Court, we carefully reviewed the entire record in the light of the state court's opinions, the United States District Court's opinion and 28 U. S. C. § 2254 (d). We stated:

> There is nothing in this record that indicates that the appellant's attorney engaged in *any* pretrial investigation. At the remand hearing, only one aspect of the defense attorney's investigation was broached—the rumored pregnancy. What is crystal clear from the record is that the defendant's lawyer did absolutely nothing to determine whether the rumor was true. The attorney testified at the remand hearing that the unsubstantiated rumor was communicated to the defendant the day of his arraignment; he told the defendant that "as we would go to trial we would nail it down one way or the other."
>
> Notwithstanding the fact that the rumor was unsubstantiated, the defendant's attorney, assuming its truth, used its negative implication to persuade his client to plead guilty. The record shows that up until the morning of the arraignment, and specifically until the conversation wherein the defendant was confronted with the possibility of the victim's pregnancy, Ford had no intention to plead guilty.
>
> The record indicates that even after the rumor was communicated to the defendant, he was disinclined to plead, reasoning that if she were pregnant, it would favor his case because he didn't impregnate her. The appellant stated at the remand hearing that in response to this reasoning, his attorney told him "they'd give her an abortion and, looking at me, 'cause I'm black and big; big and black, the jury would automatically convict me whether I was guilty or not." Thereupon, the defendant pleaded guilty to the charge of rape.
>
> We determine that when an unsubstantiated issue is deemed by both counsel and client to be significant

enough to trigger the decision to plead guilty, then there arises a duty on the part of the defense counsel to obtain the specifics surrounding the key factual issue. Such a duty necessarily demands thorough investigation. • • •

We disagree with the court below that the appellant was not prejudiced by his counsel's failure to adequately investigate the rumored pregnancy. In *McQueen v. Swenson*, [498 F. 2d 207 (8th Cir. 1974)], we stated that the prejudice element in a habeas analysis is necessary "because the failure to investigate —though a constitutional error—might in certain circumstances be a 'harmless' one and hence would not justify habeas corpus relief." *Id.*, 498 F. 2d at 218. Within a trial context, in order to secure habeas corpus relief, the petitioner must show that the ineffective assitance of counsel prejudiced his ability to prepare a defense. *Id.* at 220. *See DuPree v. United States*, 606 F. 2d 829, 831 (8th Cir. 1979), *cert. denied*, 445 U. S. 919 (1980); *United States v. Easter*, 539 F. 2d 663, 666 (8th Cir. 1976).

Within the context of an arraignment hearing, however, where the defendant enters a guilty plea, the issue of prejudice necessarily centers upon whether the attorney's failure to competently investigate any material facts prejudiced the defendant's ability to make an intelligent and voluntary plea of guilty. We feel that in this case, counsel's failure to substantiate the rumored pregnancy and his using the rumor as a tool to force the defendant to plead guilty prejudiced Ford's ability to make an intelligent and knowing decision. The resulting prejudice was not "harmless." [Emphasis included and footnotes omitted.]

A dissenting opinion was filed by Judge Arlin Adams. He dissented on the grounds that there was no "nexus between the alleged ineffective assistance and the guilty plea itself."

Had it not been for the Nebraska rule with respect to waiver of claims, we would have remanded the matter to the district court with directions to it to remand to the state court to give that court the opportunity to fully examine the question raised. As it was, we agreed with the district court that the state court would not reexamine the issue. We then made our decision and stated our reasons for making it—reasons which we still believe to be sound.

In sum, the district court and this Court considered the entire record and 28 U. S. C. § 2254 (d) when we initially decided the matter. We have reconsidered the record and the statute, and we now specifically state that it appears from the record that the merits of the factual dispute with respect to incompetency of counsel were not resolved in the state court hearing. *See* 28 U. S. C. § 2254 (d) (1).

In the event that we have misunderstood the Nebraska waiver rule, and the state court wishes to determine this issue, it will have an opportunity to do so under our order, amended to read as follows:

> The order of the district court denying the appellant's habeas corpus petition is reversed and remanded with instructions to the district court to remand the matter to the state court to give that court the opportunity, if it wishes, to make specific findings and conclusions with respect to whether the appellant received effective assistance of counsel with respect to his plea of guilty and to transmit those findings to the district court within 120 days from the date that the district court enters its order of remand. If it makes such findings, the appellant can then renew his habeas motion in federal court. If not, then the United States District Court shall order the defendant's judgment and sentence vacated. The district court shall fur-

ther order the state attorney general's office, within 120 days, to either schedule the case for trial or allow the defendant to enter a proper plea of guilty.

ADAMS, Circuit Judge, dissenting.

On remand from the United States Supreme Court this case presents a legal and factual situation that leads me now, just as it did when we first heard this appeal, to conclude that the order of the district court denying habeas corpus relief should be affirmed.

For the reasons set out in my dissenting opinion to the original panel decision, 638 F. 2d 1115, 1119-20 (1981), I do not believe that the appellant here has demonstrated the necessary nexus between the allegedly ineffective assistance of counsel he received and his ultimate decision to plead guilty. Although the asserted defect in his attorney's conduct is the attorney's failure to invesigate a rumor that the prosecutrix was pregnant, the appellant did not introduce at the district court hearing any evidence to show that his decision to plead guilty rested in whole or in part on any belief that the prosecutrix was pregnant. Indeed, the appellant testified that he was motivated not by such a belief but by an understanding that he would receive a lighter sentence. And while the majority suggests that the appellant's attorney was "using the rumor as a tool to force the defendant to plead guilty," there is no finding that supports this assertion. Indeed, it appears clear from the testimony that the attorney carefully identified the pregnancy rumor as just that—a rumor—and stated that the rumor would have to be investigated before the case went to trial. I must, therefore, agree with the district court that even if, *arguendo*, Ford's attorney was under some duty to investigate the

rumor of pregnancy, there has been no showing here that the appellant has in any way been prejudiced by his counsel's failure to investigate. Accordingly, I would affirm the district court's holding that the appellant has failed to satisfy the requisites for habeas corpus relief. *See Morrow v. Parratt*, 574 F. 2d 411, 412-13 (8th Cir. 1978); *United States v. DeCoster*, 624 F. 2d 196 (D. C. Cir. 1979) (en banc); *Cooper v. Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U. S. 974 (1979).

The Supreme Court has directed this Court, upon remand, to consider the opinion in *Sumner v. Mata*, 449 U. S. 539 (1981). In *Sumner*, the Supreme Court emphasized that, in reviewing habeas corpus petitions filed under 28 U. S. C. § 2254, a federal court is bound by the factual findings made by state court's unless one of the circumstances enumerated in section 2254 (d) applies. The Court went on to hold that if a district court believes that one of those enumerated circumstances is present—if, for example, "the merits of the factual dispute were not resolved in the State court hearing," or if "the appellant was • • • denied due process of law in the State court proceeding," or if the district court has reviewed the state court record and concluded that the state's factual determination "is not fairly supported by the record"—then the court must state explicitly its rationale for concluding that such a circumstance is present and cite the statutory provision upon which it reliefs. The Supreme Court stressed that such a statement was necessary to minimize "friction" between state and federal courts by ensuring that state court factual determinations are overturned only when those findings were clearly deficient. 449 U. S. at 543-52.

In the present case, the majority's original opinion—filed on the same day as the Supreme Court filed *Sumner*—did not make explicit reference to any of the exceptions listed in section 2254(d). On remand, the majority now invokes section 2254(d)(1) and states that "the merits of the factual dispute with respect to incompetency of counsel were not resolved in the state court hearing." Typescript op. at 7. Because the Nebraska courts were not confronted with the explicit claim that the attorney's failure to investigate the pregnancy had constituted ineffective assistance of counsel, those courts did not make any specific finding with respect to that claim.[1] *See State v. Ford*, 265 N.W. 2d 456 (1978). Accordingly I cannot disagree with the majority's statement that section 2254(d)(1) applies.

I would note, however, that the Nebraska courts did consider factual issues quite similar to those raised in the district court. Specifically, the Nebraska courts rejected the contention that Ford's guilty plea was involuntary because it rested on a belief that the prosecutrix might

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[1]Ordinarily, such a situation would indicate that the habeas petitioner had failed to exhaust available state remedies, and would require dismissal of the petition for that reason. *See* 28 U.S.C. § 2254 (b). However, as the majority notes, under Nebraska law a person may not file more than one post-trial motion challenging his conviction. Ford has already completed such a challenge, and therefore would appear to be barred from any further state relief. Under the majority's order the Nebraska courts will be provided with an opportunity to hear Ford's petition if in fact they are willing to do so. If they refuse, then the exhaustion requirement for a federal habeas petition may be deemed to have been satisfid. *See Witlam v. Mabry*, 596 F. 2d 293, 299 n. 7 (8th Cir. 1979); *Smith v. Wolf*, 506 F. 2d 556, 558-60 (8th Cir. 1974).

have been pregnant, and at the same time concluded that Ford had been represented by competent counsel "throughout the original proceeding." *Id.* at 457. Although the court did not make any specific finding with respect to the claim that defendant's counsel had failed to investigate the pregnancy rumor, one might reasonably infer from the Nebraska courts' conclusions that they had reviewed the record for evidence of ineffective assistance of counsel and had failed to uncover any such evidence, even though the rumor of pregnancy had been brought to the court's attention. In such a case, even where no definitive finding within the sense of section 2254(d) has been made by a state court, a federal court reviewing the same events for evidence of the same alleged violation—in this case ineffective assistance of counsel—might properly keep the state court's action in mind and conclude only hesitantly that the state court had overlooked an alleged violation that had been squarely within its field of vision.

For the reasons articulated in the opinion of the district court, and with due regard to the Nebraska courts' review of appellant's claims, and above all because the record is bereft of any evidence showing a connection between counsel's alleged failure to look into the rumor of the prosecutrix's pregnancy and the guilty plea, I respectfully dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

September Term, 1981

No. 80-1561

Jesse J. Ford,

Appellant,

vs.

Robert F. Parratt, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

On motion of appellee, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 12, 1982

EXHIBIT C

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 80-1561

Jesse J. Ford,

Appellant,

vs.

Robert F. Parratt, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: October 17, 1980

Filed: January 21, 1981

Before HEANEY, ADAMS,* and STEPHENSON,
Circuit Judges.

HEANEY, Circuit Judge.

*The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

This is an appeal from an order of the United States District Court for the District of Nebraska denying the appellant's petition for a writ of habeas corpus under 28 U. S. C. § 2254. We reverse and remand with instructions.

I

Appellant Ford entered a plea of guilty to the charge of rape pursuant to a plea negotiation in which the State of Nebraska agreed to drop robbery and kidnapping charges which arose out of the same incident. The state district court sentenced Ford to an indeterminate term of not less than fifteen, nor more than twenty-five years in the Nebraska Penal and Correctional Facility. Ford appealed the conviction to the Nebraska Supreme Court, challenging the severity of the sentence. The conviction and the district court's sentence were affirmed. *State v. Ford,* 194 Neb. 400, 231 N. W. 2d 515 (1975).

Thereafter, Ford filed a motion for post conviction relief, asserting that his plea of guilty was not made voluntarily and understandingly. The state district court denied him an evidentiary hearing on his motion. He appealed this order to the Nebraska Supreme Court. The Nebraska Court vacated the order of the district court and remanded the case for a complete evidentiary hearing on Ford's motion to vacate and set aside his sentence. *State v. Ford,* 198 Neb. 376, 252 N. W. 2d 643 (1977).

After a hearing, the state district court determined that his guilty plea was voluntarily and understandingly made. Ford appealed this order and it was affirmed by the Nebraska Supreme Court. *State v. Ford,* 200 Neb. 779, 265 N. W. 2d 456 (1978).

On September 19, 1978, Ford filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the District of Nebraska. On June 11, 1980, the district court entered its order denying the petitioner's requested relief.

Appellant Ford argues on appeal that his guilty plea should be vacated on two separate and independent constitutional grounds: (1) that his plea was entered without effective assistance of counsel, thus it was not voluntarily and knowingly made; and (2) that the trial judge who accepted his plea did not comply with *Boykin v. Alabama*, 395 U. S. 238 (1969), thus the defendant entered his guilty plea without a full understanding of what the plea connotes and its consequences. Since we determine that Ford's guilty plea was entered without effective assistance of counsel, we find it is unnecessary to discuss the appellant's alternative argument.

II

For over fifteen years, it has been clear beyond doubt that a defendant pleading guilty to a felony charge has a federal constitutional right to the assistance of counsel. *White v. Maryland*, 373 U. S. 59, 59-60 (1963); *Arsenault v. Massachusetts*, 393 U. S. 5, 6 (1968). *See also McMann v. Richardson*, 397 U. S. 759, 771 n. 4 (1970); *McQueen v. Swenson*, 498 F. 2d 207, 213 (8th Cir. 1974). Furthermore, as we stated in *McQueen v. Swenson, supra*, "[s]ince the days of the 'Scottsboro boys' rape case, *Powell v. Alabama*, 287 U. S. 45 (1932), it has also been accepted that a state defendant has a right not only to the timely appointment of counsel but also to the assistance of counsel whose quality of performance does not fall below a minimum level of effectiveness." *McQueen v. Swenson, supra*, 498 F. 2d at 213. *See McMann v. Richardson, supra*, 397 U. S. at 771 n. 14; *Reece v. Georgia*, 350 U. S. 85, 90 (1955); *Glasser v. United States*, 315 U. S. 60, 69-70 (1942).

In this Circuit, counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *See Morrow v. Parratt*, 574 F. 2d 411, 412 (8th Cir. 1978); *Benson v. United States*, 552 F. 2d 223, 224 (8th Cir. 1977), *cert. denied*, 434 U.S. 851 (1977). We evaluate a habeas corpus petition alleging ineffective assistance of counsel through a two-step analysis. First, the petitioner must establish that his attorney failed to exercise the customary skill and diligence that a reasonbly competent attorney would have performed under the same set of circumstances. Second, the petitioner must show that his lawyer's ineffectiveness prejudiced him.

Here, the appeliant asserts that counsel's failure to investigate an unsubstantiated rumor that his alleged rape victim was pregnant constituted ineffective assistance of counsel. We have addressed the question of how thorough an attorney's pretrial investigation must be before he may intelligently advise his client to plead guilty. In *Morrow v. Parratt, supra*, we stated that "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses." *Morrow v. Parratt, supra*, 574 F. 2d at 413. *See also Benson v. United States, supra*, 552 F. 2d at 225.

There is nothing in this record that indicates that the appellant's attorney engaged in *any* pretrial investigation. At the remand hearing, only one aspect of the defense attorney's investigation was broached—the rumored pregnancy. What is crystal clear from the record is that the defendant's lawyer did absolutely nothing to determine whether the rumor was true. The attorney testified at

the remand hearing that the unsubstantiated rumor was communicated to the defendant the day of his arraignment; he told the defendant that "as we would go to trial we would nail it down one way or the other."

Notwithstanding the fact that the rumor was unsubstantiated, the defendant's attorney, assuming its truth, used its negative implication to persuade his client to plead guilty. The record shows that up until the morning of the arraignment, and specifically until the conversation wherein the defendant was confronted with the possibility of the victim's pregnancy, Ford had no intention to plead guilty.

The record indicates that even after the rumor was communicated to the defendant, he was disinclined to plead, reasoning that if she were pregnant, it would favor his case because he didn't impregnate her. The appellant stated at the remand hearing that in response to this reasoning, his attorney told him "they'd give her an abortion and, looking at me, 'cause I'm black and big; big and black, the jury would automatically convict me whether I was guilty or not."[1] Thereupon, the defendant pleaded guilty to the charge of rape.[2]

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1 The defendant's lawyer testified at the remand hearing that he could not recall making the statement; he said he did not think he made the statement because, looking at the defendant the afternoon of the remand hearing, he didn't appear to be that large. This is hardly an effective denial.

2 At the remand hearing, on appeal to the Nebraska Supreme Court, and before the federal district court, the appellant urged that his plea was induced by a promise of a two-year sentence and the threat of five fifty-year sentences running back to back if the guilty plea was not entered. The appellant has not forcefully argued this position on appeal and we determine that it is unnecessary to address it here.

We determine that when an unsubstantiated issue is deemed by both counsel and client to be significant enough to trigger the decision to plead guilty, then there arises a duty on the part of the defense counsel to obtain the specifics surrounding the key factual issue. Such a duty necessarily demands thorough investigation. We have long required that counsel be afforded the opportunity and in fact "make such *preparations for the arraignment* and trial as the facts of the case fairly demand • • • ." *McQueen v. Swenson, supra,* 498 F. 2d at 216 (quoting *Maye v. Pescor,* 162 F. 2d 641, 643 (8th Cir. 1947) (emphasis added". Here, counsel's failure to investigate and determine the truth of the rumored pregnancy, in conjunction with his using the rumor to persuade Ford to plead guilty, constitutes failure to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances.

We disagree with the court below that the appellant was not prejudiced by his counsel's failure to adequately investigate the rumored pregnancy. In *McQueen v. Swenson, supra,* we stated that the prejudice element in a habeas analysis is necessary "because the failure to investigate—though a constitutional error—might in certain circumstances be a 'harmless' one and hence would not justify habeas corpus relief." *Id.,* 498 F. 2d at 218. Within a trial context, in order to secure habeas corpus relief, the petitioner must show that the ineffective assistance of counsel prejudiced his ability to prepare a defense. *Id.* at 220. *See DuPree v. United States,* 606 F. 2d 829, 831 (8th Cir. 1979), *cert. denied,* 445 U. S. 919 (1980); *United States v. Easter,* 539 F. 2d 663, 666 (8th Cir. 1976).

Within the context of an arraignment hearing, however, where the defendant enters a guilty plea, the issue of

prejudice necessarily centers upon whether the attorney's failure to competently investigate any material facts prejudiced the defendant's ability to make an intelligent and voluntary plea of guilty. We feel that in this case, counsel's failure to substantiate the rumored pregnancy and his using the rumor as a tool to force the defendant to plead guilty prejudiced Ford's ability to make an intelligent and knowing decision. The resulting prejudice was not "harmless."[3]

III

The appellee contends that the Supreme Court's decision in *McMann v. Richardson, supra,* compels us to affirm the order of the district court denying the appellant's habeas corpus petition. We disagree. *McMann v. Richardson, supra,* and its two companion cases, *Brady v. United States,* 397 U.S. 742 (1970); *Parker v. North Carolina,* 397 U.S. 790 (1970), are generally known as the *Brady* trilogy. All three cases dealt with the effect of a guilty plea on the later assertion of claimed violations of certain constitutional rights.

In *Brady v. United States, supra,* the Court ruled that an otherwise valid guilty plea to a violation of the Federal Kidnapping Act was voluntarily and knowingly entered notwithstanding the fact that what motivated the plea was the defendant's decision to avoid the death penalty. Although the death penalty provision in the statute

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3 Although the offense with which Ford is charged is alleged to have occurred in July, 1974, there is nothing in the record to indicate, and the appellee has never argued, that the state will be prejudiced in any way if the matter were to be set for trial at this time. Furthermore, the record does not establish that the evidence against the defendant is so overwhelming that the state was certain to obtain a conviction.

was invalidated on constitutional grounds, the plea was nevertheless not susceptible to collateral attack. *Brady v. United States, supra,* 397 U.S. at 751. In *Parker v. North Carolina, supra,* the Court determined that an otherwise valid guilty plea to first degree burglary was not subject to attack on the basis that his coerced confession to the crime was received unconstitutionally and was therefore, actually inadmissible. The defendant argued that since his confession was the primary motivating factor in his decision to plead guilty, necessarily his plea was tainted. The Court disagreed, citing *McCann v. Richardson, supra. Parker v. North Carolina, supra,* 397 U.S. at 796-797.[4] In *McMann v. Richardson, supra,* the Court determined that a guilty plea, which was entered on reasonably competent advice of counsel, was not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. *McMann v. Richardson, supra,* 397 U.S. at 770. Finally, in *Tollett v. Henderson,* 411 U.S. 258 (1973), the Court ruled that when a defendant enters a guilty plea upon the reasonably competent advice of counsel, he is not automatically entitled to federal collateral relief upon the showing that the indicting grand jury was unconstitutionally selected. *Id.* at 266.

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4 The defendant in *Parker v. North Carolina,* 397 U.S. 790 (1970), also asserted that the grand jury which indicted him was selected in such a manner that members of his race were systematically excluded. The court determined that the question was not timely raised and, therefore, affirmed the lower court's decision that relief was unavailable. *Parker v. North Carolina, supra,* 397 U.S. at 798. *See Tollett v. Henderson,* 411 U.S. 258, 266-267 (1973).

A careful reading of these cases reveals that the *Brady* trilogy and *Tollett*, by their own terms, do not stand as a bar to this Court's granting the appellant his requested relief here. One common thread running throughout the *Brady* trilogy and *Tollett* is that a guilty plea is not subject to attack *unless* it was made without reasonably effective assistance of counsel, or was otherwise involuntarily or unintelligently entered. *Brady v. United States, supra,* 397 U.S. at 754-756; *McMann v. Richardson, supra,* 397 U.S. at 770-771; *Parker v. North Carolina, supra,* 397 U.S. at 797-798; *Tollett v. Henderson, supra,* 411 U.S. at 266-268. Since we determine that the appellant did not secure his constitutionally required effective assistance of counsel, *Brady* and its progeny do not stand as a bar to this Court's decision to grant Ford habeas corpus relief.

Accordingly, the order of the district court denying the appellant's habeas corpus petition is reversed and remanded with instructions to the district court to order the defendant's judgment and sentence vacated. The district court shall further order the state attorney general's office, within 120 days, to either schedule the case for trial or allow the defendant to enter a proper plea of guilty.

ADAMS, Circuit Judge, dissenting.

Although I agree with the majority that ineffective assistance of counsel may vitiate a guilty plea, I believe it can only do so when there is a nexus between the alleged ineffective assistance and the guilty plea itself.

Here, the claimed ineffective assistance of counsel is that the defendant's attorney did not investigate the rumor that the prosecutrix was pregnant. Although I agree that

it would have been preferable had the source of the rumor been tracked down, I do not see, based on the record here, how exploring the rumor would have caused the defendant not to enter the guilty plea. Indeed, the record shows that the defendant, whether rightly or wrongly, believed that the fact of pregnancy might have helped his defense.[1]

More importantly, perhaps, the defendant did not testify at the hearing on his petition for habeas that the fact of pregnancy influenced his decision to plead guilty. In fact, he testified that the sole reason for the plea was his desire to obtain a reduced sentence. After the trial judge imposed a 15-25 year sentence penalty, the defendant's appeal to the Nebraska Supreme Court was predicated solely on the length of incarceration.

As this Court stated in *Morrow v. Parratt*, 574 F. 2d 411, 412-413 (8th Cir. 1978):

> "The evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process in this circuit." *Rinehart v. Brewer*, 561 F. 2d 126, 131 (8th Cir. 1977). First, the defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. [Citations omitted.] Secondly, the defendant must show that he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. [Citations omitted.]

In *Morrow*, the Court specifically noted that the discovery of facts in question "may have completely changed the defense strategy." No such determination was made by the

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1 In the proceedings accompanying the guilty plea, the defendant admitted that he had had a forcible relationship with the prosecutrix.

witnesses here or by the trial court, and, on the basis of the evidence, it is difficult to see how such a determination could have been made. Assuming *arguendo* that the defendant met the first step in the Morrow test, the absence of connection between the pregnancy rumor and his motives for pleading guilty precluded a finding of material prejudice.[2]

The opinion of this Court in *Todd v. Lockhart*, 490 F. 2d 626 (8th Cir. 1974), is an effective answer to petitioner's second contention on appeal, namely, that the trial court committed reversible error in the manner in which it addressed defendant in the course of accepting his guilty plea. Although the trial court may not have recited to the defendant all of the factors bearing on accepting a plea contemplated in *Boykin v. Alabama*, 395 U. S. 238 (1969), it was fully adduced at Ford's post-conviction evidentiary hearing that his guilty plea was entered knowingly and voluntarily. Under *Todd*, this post-conviction determination cures any error the trial court may have committed.

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2 Recently, in en banc decisions, two other circuits have determined that a defendant bears the burden of demonstrating that actual prejudice ensued from the alleged ineffective assistance of counsel. These courts held that the prejudice requirement is compelled by the Sixth Amendment. *United States v. Decoster*, No. 72-1283 (D. C. Cir. July 10, 1979); *Cooper v. Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U. S. 974 (1979).

Commentators have observed that *Decoster* denotes a trend toward imposing a more stringent standard on a defendant before he will be granted a new trial as a result of ineffective assistance. *See, e. g.*, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053 (1980); Comment, *Defendant Must Prove Counsel's Serious Incompetence and Likelihood that Such Incompetence Had an Effect on the Outcome*—United States v. Decoster, 53 Temp. L. Q. 193 (1980).

Accordingly, and with all due respect to my distinguished colleagues, I would deny the petition for habeas corpus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

EXHIBIT D

JUDGMENT

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 80-1561 September Term, 1980

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

(Filed March 9, 1981)

APPEAL FROM the United States District Court for the District of Nebraska.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjuged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for proceedings consistent with the majority opinion of this Court.

January 21, 1981

A true copy:

Attest:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, 8th Circuit.

EXHIBIT E

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court for the District of Nebraska.

The Court having carefully [considered] appellee's motion for stay of mandate in this cause, it is now here ordered by the Court that motion is denied.

February 20, 1981

EXHIBIT F

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 20, 1981

EXHIBIT G

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term, 1980

No. 80-1561

JESSE J. FORD,

Appellant,

vs.

ROBERT F. PARRATT, Warden,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

(Filed April 15, 1981)

In accordance with directions of the Supreme Court of the United States, mandate previously issued and sent to the Clerk of the U.S. District Court for the District Court of Nebraska, is hereby recalled and stayed pending the filing and disposition of petition for writ of certiorari. This order is conditioned upon the filing of said petition for a writ of certiorari on or before May 1, 1981.

April 13, 1981

A true copy:

Attest: /s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
For the District of Nebraska

JESSE J. FORD,

Petitioner,

vs.

ROBERT F. PARRATT, Warden,

Respondent.

Civ. 78-L-209

MEMORANDUM OPINION

(Filed June 11, 1980)

This action is a 28 U. S. C. § 2254 petition for a writ of habeas corpus. The petitioner, Jesse J. Ford, pled guilty to a charge of rape and now challenges his conviction and sentence of fifteen to twenty-five years. Although numerous issues were raised by Ford in his initial *pro se* petition, counsel has since been appointed and the petitioner's claims have been narrowed to three:

(1) That Ford's plea of guilty was induced by threats and promises;

(2) That Ford was deprived of the right to effective assistance of counsel;

(3) That the trial court's failure to comply with *Boykin v. Alabama,* 395 U. S. 238 (1969), requires that the plea be vacated.

The respondent denies the above allegations and also raises exhaustion issues. The parties have agreed to submit the case on the record developed at the state post-conviction hearing, the Court has so ordered, and the matter is presently before the Court and ready for disposition.

STATE COURT PROCEEDINGS

Ford was originally charged in the District Court for Dakota County, Nebraska, with two counts of robbery, two counts of kidnapping and one count of rape. Pursuant to a plea bargain, the robbery and kidnapping charges were dropped and Ford entered a plea of guilty to the rape charge which was accepted by the court. Ford was sentenced to a term of fifteen to twenty-five years. On appeal Ford assigned as error the severity of the sentence and the imposition of a minimum term in excess of one-third of the maximum actually imposed. The Nebraska Supreme Court affirmed the judgment and sentence of the district court. *State v. Ford,* 194 Neb. 400, 231 N. W. 2d 515 (1975).

In a post-conviction proceeding to vacate and set aside the sentence, Ford alleged

> that his guilty plea was not voluntary because his court-appointed attorney told him that he would not receive a sentence in excess of 3 to 15 years imprisonment, and that he would not serve more than 2 years on the sentence. He also alleged that he was threatened with "five (5) fifties (50) back to back"; that he was told that the rape victim was pregnant and a local jury would hang him; and that his attorney threatened to quit if he did not follow his advice.
>
> *State v. Ford,* 198 Neb. 376, 377, 252 N. W. 2d 643, 644 (1977).

The district court denied Ford an evidentiary hearing and dismissed the motion. The Nebraska Supreme Court remanded with directions to grant an evidentiary hearing since it found that the record did not affirmatively disclose that Ford's plea was entered understandingly and voluntarily. *State v. Ford, supra,* 198 Neb. at

378, 252 N. W. 2d at 644. The Supreme Court observed that in response to the district court's question at the arraignment as to whether any promises or threats were made to induce the guilty plea, the county attorney had interrupted before Ford had an opportunity to respond and the county attorney informed the court of the plea bargaining agreement. Upon concluding his explanation of the plea bargain, the county attorney asked Ford if there was any other matter which was a part of the plea bargain, and Ford responded, "No." The defendant was not asked again, however, whether any threats or promises were made. *Citing Boykin v. Alabama,* 395 U. S. 238 (1969), the Nebraska Supreme Court noted that a waiver of rights cannot be presumed from a silent record. Therefore, the court ruled that an evidentiary hearing was necessary to determine whether Ford's plea was understandingly and voluntarily entered and whether Ford had the effective assistance of counsel. *State v. Ford, supra,* 198 Neb. at 378, 252 N. W. 2d at 644.

At the evidentiary hearing, Ford and five members of his family testified that, prior to Ford's araignment, his attorney had promised him a sentence of three to fifteen years if he pled guilty and threatened a sentence of fifty years on each of the five charges if Ford went to trial. Ford also testified that his attorney told him that the victim was pregnant and that a local jury would hang him. Ford's attorney testified that Ford was fully advised of the terms of the plea bargain, the various sentences that were possible, and the possibility of the victim's pregnancy. With regard to the pregnancy of the victim, Ford's attorney testified that Ford was informed that it was an unsubstantiated rumor that they would "nail down one way or the other" as they went to trial.

The district court found that Ford's plea of guilty was understandingly and voluntarily made and that he was represented by competent counsel. The Nebraska Supreme Court affirmed. *State v. Ford,* 200 Neb. 779, 265 N. W. 2d 456 (1978). This habeas corpus petition followed.

I.

Ford's primary contention at the state post-conviction hearing was that his guilty plea was induced by his attorney's promises of a short sentence if he pled guilty, threats of a long sentence if he went to trial, and statements that the victim was pregnant. This issue was also raised in Ford's habeas petition, but in his brief he has chosen not to challenge the finding of the district court at the post-conviction hearing that no promises or threats were made to Ford to obtain a guilty plea. Pursuant to 28 U. S. C. § 2254(d), a presumption of correctness attaches to state court determinations evidenced by a written finding after a full and fair evidentiary hearing. Once the presumption is properly invoked, the habeas petitioner bears the burden of proving by "convincing" evidence that the state court finding was erroneous. *Lyle v. Wyrick,* 565 F. 2d 529, 532 (8th Cir. 1977), *cert. denied,* 435 U. S. 954 (1978). In the present case, Ford does not allege any of the exceptions (42 U. S. C. § 2254(d)(1)-(8)) to invocation of the presumption of correctness and appears to have been afforded a full and fair hearing in state court. The testimony presented to the state post-conviction court was conflicting and that court's finding that no promises or threats were made to induce the guilty plea is fairly supported by the record as a whole. Accordingly, this Court holds that the state post-conviction

court's finding that no promises or threats were made is entitled to a presumption of correctness and that Ford has not shown this finding to be erroneous.

II.

The principal argument presently advanced by the petitioner is that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape. At the post-conviction evidentiary hearing, Ford testified that, prior to his arraignment, he and members of his family were discussing with his attorney whether to accept a plea bargain when his attorney asked his family to leave for a few minutes. At that time, Ford testified, one of his attorneys told him that the victim was pregnant and that a jury would automatically convict him. Ford's family members confirmed his testimony that they were asked to leave Ford and his attorney, and Ford's wife testified that, after they returned, Ford told her about the victim's pregnancy. Robert Scoville, Ford's principal attorney at the arraignment, testified that he did not remember when he had told Ford of the rumored pregnancy, but that he did discuss it with him. Scoville testified that he advised Ford that the rumor was unsubstantiated and that as they went to trial they would "nail it down one way or the other."

In reply, the state asserts that Ford did have the effective assistance of counsel, but first contends that Ford failed to exhaust his state remedy as to this claim on the grounds now alleged.

A. EXHAUSTION

The state argues that the question of whether Ford's counsel *investigated* the rumored pregnancy was never before the state court as a reason for Ford's allegation that his counsel was ineffective. Therefore, the state maintains, Ford has not exhausted his state remedies as to that issue. As authority for this contention, the state cites *Burnside v. Sigler*, 451 F. 2d 987 (8th Cir. 1971) (*per curiam*). In that case the court found that the petitioner had alleged ineffective assistance of counsel at the state level but not on the grounds presented to the federal court. For that reason the circuit court directed that the cause be dismissed for failure of the petitioner to adequately exhaust his state remedies.

The petitioner in the instant case contends that the evidence before this Court is the same as that presented to the state courts and that considering the charge of ineffective assistance of counsel which was before the state courts, the failure to investigate the pregnancy rumor was inextricably a part of the claim that the plea was wrongfully induced.

First, while the clear emphasis of Ford's claim in the state courts was on the alleged promises and threats made to Ford by his attorney to obtain a guilty plea, the general issue of incompetency of counsel was raised and the Nebraska Supreme Court specifically found that "the defendant was represented by competent counsel throughout the original proceedings." *State v. Ford*, 200 Neb. 779, 781, 265 N. W. 2d 456, 457 (1978). Second, even if the theory of ineffective counsel presently advanced by the petitioner was not adequately presented in the state

courts, no remedy is now available to the petitioner in the Nebraska courts. Under Nebraska law, after a first motion for post-conviction relief has been judicially determined, a petitioner is precluded from raising in a subsequent motion for post-conviction relief any grounds which could have been raised in the first proceeding. *State v. Newton*, 202 Neb. 361, 363, 275 N. W. 2d 297, 299 (1979). Existing Eighth Circuit precedent indicates that unless the petitioner has deliberately bypassed state remedies, the exhaustion doctrine does not bar habeas review when no state court relief is available at the time a petition is filed in federal court. *Witham v. Mabry*, 596 F. 2d 293, 299 n. 7 (8th Cir. 1979) (concerning Arkansas post-conviction practice); *Smith v. Wolff*, 506 F. 2d 556, 558-60 (8th Cir. 1974). *Accord, Johnson v. Johnson*, 531 F. 2d 169, 173 (3d Cir.), *cert. denied*, 425 U. S. 997 (1976) (concerning Pennsylvania's post-conviction hearing act). Although the Supreme Court has held that state procedural defaults occurring during trial will also bar federal habeas review absent a showing of "cause" and "prejudice," *Wainwright v. Sykes*, 433 U. S. 72 (1977), this ruling has not yet been extended to post trial defaults.[1]

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1 In *Sykes*, the court questioned the broad language of *Fay v. Noia*, 372 U. S. 391 (1963), which suggested that state procedural defaults were ineffective to bar review of underlying federal claims in federal habeas proceedings, absent a "deliberate bypass" of the state procedures. *Fay* involved the waiver of the right to appeal in state court. Despite the petitioner's failure to appeal his conviction to the state court the Supreme Court in *Fay* held that he was nonetheless entitled to raise the claim in a federal habeas proceeding.

In *Sykes*, the Court dealt with the petitioner's failure to object to the admission of his confession at trial. Pursuant

(Continued on the next page)

From the record in the instant case, it does not appear that Ford has deliberately bypassed state procedures and the state has not so alleged. The burden of pleading and proving a deliberate bypass is on the state. *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974), *cert. denied*, 420 U. S. 912 (1975). Accordingly, even if the theory of ineffective counsel presently advanced by Ford was not adequately presented to the state courts, under the circum-

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to relevant state law, failure to timely object constituted a waiver. The Supreme Court rejected the deliberate bypass standard announced in *Fay*, and held that with respect to procedural defaults occurring during trial, federal habeas review would be barred absent a showing of "cause" for noncompliance with the state procedure and some showing of actual "prejudice" resulting from the alleged constitutional violation. The Court specifically refused to consider whether *Fay*, which involved waiver of the right to appeal in state court, would be decided differently after the *Sykes* opinion. *Sykes, supra*, 433 U. S. at 88 n. 12.

Although the Supreme Court was careful in *Sykes* to limit its holding to waivers occurring at the trial stage, some of the reasons for its rejection of the deliberate bypass rule seem applicable to any procedural defaults, including post-trial, which rest on adequate and independent state grounds. Since *Sykes*, however, at least one Eighth Circuit opinion has suggested that, with regard to the exhaustion doctrine, where state procedural rules preclude the filing of a second post-conviction petition, federal habeas review need not be dismissed even though the petitioner did not raise all of his claims of error before the state court. *Witham* v. *Mabry*, 596 F. 2d 293, 299 n. 7 (8th Cir. 1979). The court in that case did not discuss either the deliberate bypass rule or the implications of *Sykes*. Given the narrow holding of *Sykes*, however, *Witham* is not necessarily inconsistent with it. Since the Supreme Court specifically chose not to address the question of waivers in state post-trial proceedings, it seems permissible to follow the prior line of authority in the Eighth Circuit and the recent *Witham* decision, which indicate that where waiver in state post-conviction proceedings is involved, federal relief can be denied on exhaustion grounds only if the petitioner has deliberately bypassed the state procedure.

stances of this case the exhaustion doctrine does not prevent review of that claim in this habeas proceeding.

B. FAILURE TO INVESTIGATE

Ford argues that the central issue in this proceeding is whether his trial counsel conducted an appropriate investigation to determine whether the victim was pregnant before allowing Ford to enter a plea of guilty. The rumor of pregnancy is alleged to have been a significant factor in the petitioner's decision to plead guilty, and trial counsel's failure to investigate this rumor before a plea was entered is alleged to have deprived the petitioner of the right to effective assistanc of counsel.

As stated in *Morrow v. Parratt*, 574 F. 2d 411, 412-13 (8th Cir. 1978),

> "The evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process in this circuit." *Rinehart v. Brewer*, 561 F. 2d 126, 131 (8th Cir. 1977). First, the defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. (Citations omitted.) Secondly, the defendant must show he was materially prejudiced in the defense of his case by the actions or inactions of defense counsel. (Citations omitted.)

See also, Witham v. Mabry, 596 F. 2d 293, 298 (8th Cir. 1979).

In regard to the first inquiry, the Eighth Circuit has stated that "ordinarily a reasonably competent attorney will conduct an in-depth investigation of the case which includes an independent interviewing of the witnesses." *Morrow v. Parratt, supra*, 574 F. 2d at 413. In the in-

stant case, the petitioner's trial attorney apparently recognized such a duty and testified that he told the petitioner that the rumor about the victim's pregnancy was unsubstantiated and that they would "nail it down one way or the other" as they went to trial. The question, therefore, is whether an investigation into the rumored pregnancy should have been conducted before a guilty plea was entered. While it seems indisputable that under some circumstances the pregnancy of a rape victim would be a significant factor in deciding whether to enter a guilty plea, it is not apparent under the circumstances of this case that the negotiation of a plea bargain without an investigation of the rumored pregnancy would constitute a failure to exercise the customary skills and diligence of a reasonably competent attorney. The petitioner's attorney testified that:

> A. Well, it [the rumored pregnancy] was part of the over-all picture of the whole thing. We had to communicate it to the Defendant and advise him that if [sic] was unsubstantiated and as we would go to trial we would nail it down one way or the other. But, at that point, it was how it was and it was given to him to use along with all the other bits of information that he had and that we had acquired through our investigations and the County Attorney's Office. It was given to him to reach a defense strategy. I don't think it was a major factor, at least in my awareness, in any decision that was made.
>
> Transcript of post-conviction hearing, May 12, 1977, page 73.

Whether or not it was a breach of duty to negotiate a plea bargain without first investigating the rumor, Ford has failed to establish the second element of a claim of ineffective assistance of counsel, namely, that he was ma-

terially prejudiced by the alleged breach of duty. No evidence in the record shows whether, if the attorney had investigated, the pregnancy rumor would have been discovered to be true or false. If the rumor was true, the petitioner does not alleges that he would have gone to trial instead of pleading guilty. If the rumor was false, the petitioner has not suggested how the non-pregnancy of the victim could have aided him at trial, since the pregnancy of a rape victim is not an element of the crime, nor is the victim's non-pregnancy an element of any defense. Twice during the post-conviction hearing, in fact, the petitioner testified that he felt that if the victim was pregnant, it was in his favor. The petitioner also testified that he pled guilty "solely because I thought I was going to get two years in the pen." As in *McQueen v. Swenson*, 498 F. 2d 207, 220 (8th Cir. 1974), this appears to be a case where "the petitioner must shoulder an initial burden of showing the existence of admissible evidence which would have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." *Accord, United States v. McMillian*, 606 F. 2d 245, 248 (8th Cir. 1979). Here, the petitioner has not only failed to show that an investigation would have established that the victim was not pregnant, but also how the non-pregnancy of the victim would have aided him in defending the charge of rape.

III.

The petitioner also argues in his brief that his plea was constitutionally defective because the trial court accepted the guilty plea without complying with the require-

ments set out in *Boykin v. Alabama*, 395 U. S. 238 (1969). *Boykin* held that the waiver of federal constitutional rights that takes place when a plea of guilty is entered in a state criminal trial cannot be presumed from a silent record, and that the record must disclose that a defendant voluntarily and understandingly entered his plea of guilty. In *Todd v. Lockhart*, 490 F. 2d 626, 627 (8th Cir. 1974) (*per curiam*), the Eighth Circuit joined a number of other courts in holding that the *Boykin* decision does not require that every plea of guilty be automatically vacated when its precepts are not complied with. Stating that as a constitutional matter the question was whether the plea was voluntary and intelligent, the *Todd* court held that a state may, in a state post-conviction hearing, cure an otherwise defective plea-taking transcript. *Todd, supra*, 490 F. 2d at 627. The *Todd* court also held, however, that the burden is upon the state to affirmatively prove in a post-conviction hearing that the plea was voluntary and intelligent.

In the instant case, the Nebraska Supreme Court granted the petitioner a post-conviction evidentiary hearing on the ground that since the record did not affirmatively show the absence of promises and threats, the record failed to establish that the petitioner entered his plea understandingly and voluntarily. *State v. Ford*, 198 Neb. 376, 378, 252 N. W. 2d 643, 644 (1977). As already discussed, the state court's finding that no promises or threats were made to the petitioner is fairly supported by the record as a whole. Besides the allegation of ineffective assistance of counsel, which has also been disposed of, this was the only claim seriously argued by the petitioner in the state courts. Although in his brief Ford alleges

that the record does not show that he was told by the trial judge of the privilege against compulsory self-incrimination, right to confront his accuser, and right to a unanimous jury verdict, the focus of the state post-conviction hearing was not on these issues, and the petitioner has never claimed that he did not understand any of these rights. Furthermore, *Boykin* has not been read to require the express articulation and waiver of specific rights at the time the plea is entered. *Todd v. Lockhart*, 490 F. 2d 626, 628 n. 1 (8th Cir. 1974). In any event, the record of the arraignment and plea hearing discloses that the trial judge inquired, *inter alia*, as to the factual basis for the plea, whether the petitioner understood what a jury trial was and his entitlement to the same, whether the petitioner had adequate time to consult with his attorney, and whether, knowing the penalty the law provided for, the petitioner still desired to plead guilty. The record of the state post-conviction hearing fairly supports the findings that no promises or threats were made to the petitioner, and that the petitioner was not deprived of the right to effective assistance of counsel. Based upon the petitioner's responses at the arraignment and plea hearing, the record developed at the post-conviction evidentiary hearing, and the fact that this was not the petitioner's first experience with plea bargaining, the Court finds that the petitioner's plea was entered voluntatrily and knowingly.

In sum, having carefully examined he record of all the revelant proceedings, involving the petitioner in the Nebraska courts, and having considered the briefs submitted by the parties, the Court finds that the petitioner was not deprived of th[illegible]ffective assistance of counsel and that his plea of guilty was entered voluntarily and under-

standingly. A separate order in accordance with this memorandum will be entered dismissing the petition for a writ of habeas corpus.

BY THE COURT:

/s/ Albert G. Schatz
JUDGE, UNITED STATES
DISTRICT COURT

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 78-L-209

JESSE J. FORD,

Petitioner,

vs.

ROBERT F. PARRATT, Warden,

Respondent.

ORDER

(Filed June 11, 1980)

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that the petition for writ of habeas corpus in the above-entitled matter should be and the same is hereby dismissed.

BY THE COURT:

/s/ Albert G. Schatz
JUDGE, UNITED STATES
DISTRICT COURT

EXHIBIT J

STATE OF NEBRASKA, Appellee, v. JESSE JAMES FORD, Appellant.

198 Neb. 376, 252 N. W. 2d 643 (April 20, 1977)

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Order dismissing proceeding vacated and cause remanded to District Court for further proceedings.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, CLINTON, BRODKEY, and WHITE, JJ.

McCOWN, J.

This is a post conviction proceeding to vacate and set aside a 15 to 25 year sentence imposed against the defendant following a plea of guilty to a charge of rape. The District Court determined that the files and records in the case showed to the satisfaction of the court that the defendant was entitled to no relief, denied an evidentiary hearing, and dismissed the motion.

The defendant, Jesse James Ford, pleaded guilty to a charge of rape pursuant to a plea bargain in which the State dismissed charges of robbery and kidnapping arising out of the same incident. He was represented by appointed counsel. The direct appeal is reported in State v. Ford, 194 Neb. 400, 231 N. W. 2d 515.

In his pro se motion for post conviction relief the defendant alleges that his guilty plea was not voluntary because his court-appointed attorney told him that he would not receive a sentence in excess of 3 to 15 years imprisonment, and that he would not serve more than 2 years

on the sentence. He also alleged that he was threatened with "five (5) fifties (50) back to back"; that he was told that the rape victim was pregnant and a local jury would hang him; and that his attorney threatened to quit if he did not follow his advice.

The record establishes that at the arraignment the court asked the defendant: "Has anyone offered you anything or made any promises or threats to you to get you to plead guilty?" Before defendant had an opportunity to respond, the county attorney interrupted and proceeded to inform the court of the plea bargaining agreement which had been entered into. The agreement was that in exchange for the guilty plea the State would dismiss the robbery and kidnapping charges, and would make no recommendations at sentencing on the rape charge. Upon concluding his explanation of the plea bargain he had made with defendant's attorney, the county attorney asked the defendant if there was any other stipulation or matter which was a part of the plea bargain and the defendant responded "no." Thereafter the defendant was never asked by anyone whether any promises or threats had been made to him by anyone, and at no time did the defendant ever respond to or answer such a question.

In Boykin v. Alabama, 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, the United States Supreme Court held that a waiver of rights cannot be presumed from a silent record and that the record must affirmatively disclose that a defendant entered his plea understandingly and voluntarily.

In State v. Turner, 186 Neb. 424, 183 N. W. 2d 763, in compliance with Boykin, this court held that the record

must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. Turner also held that there must be substantial compliance with the Standards Relating to Pleas of Guilty adopted by the American Bar Association as a minimum procedure in the taking of guilty pleas. Those standards require the court to "address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea." Standard 1.5, p. 8, Standards Relating to Pleas of Guilty. The record establishes that the standards were not complied with in this case. Because of the failure to affirmatively show the absence of promises or threats, the record fails to establish that the defendant entered his plea understandingly and voluntarily, and it also fails to affirmatively establish that defendant's allegations as to promises and threats do not entitle him to relief. An evidentiary hearing was necessary to determine whether or not defendant's allegations were supported by evidence that his plea was not understandingly and voluntarily entered, and that he did not have the effective assistance of counsel. In a post conviction proceeding, the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.

The State contends that allegations as to incompetence of counsel were not sufficiently pleaded. The District Court, however, considered the issue sufficiently raised since the court found that defendant was ably and competently represented, even though the determination was made without an evidentiary hearing. The State also contends that an issue as to whether the State violated the plea bargain by making recommendations as to sen-

tencing cannot be considered here because the issue was not presented to the District Court. In view of the disposition made here it is unnecessary to determine whether the pro se motion appropriately and properly raised these issues.

The order of the District Court dismissing the proceeding is vacated and the cause remanded with directions to grant an evidentiary hearing on defendant's motion to vacate and set aside his sentence.

ORDER dismissing proceeding vacated and cause remanded to district court for further proceedings.

EXHIBIT K

STATE OF NEBRASKA,

Appellee,

vs.

JESSE JAMES FORD,

Appellant.

200 Neb. 779, 265 N. W. 2d 456 (May 3, 1978)

Appeal from the District Court for Dakota County: Lloyd W. Kelly, Jr., Judge. Affirmed.

Heard before White, C. J., Spencer, Boslaugh, McCown, Clinton, Brodkey, and White, JJ.

White, C. Thomas, J.

This is an appeal from an order of the District Court denying post conviction relief to defendant following an evidentiary hearing. The District Court found that defendant's plea of guilty to a charge of rape was understandingly and voluntarily made. We affirm the decision of the District Court.

The defendant was originally charged with two counts of robbery, two of kidnapping, and one of rape. Pursuant to a plea bargain, the robbery and kidnapping charges were dropped and defendant entered a plea of guilty to the rape charge which was accepted by the court. The defendant was sentenced to a term of 15 to 25 years in the Nebraska Penal and Correctional Complex. This court upheld the sentence. State v. Ford, 194 Neb. 400, 231 N. W. 2d 515. The District Court dismissed the defendant's motion to vacate the sentence without an evidentiary

hearing. This court vacated that order and remanded the cause for an evidentiary hearing. State v. Ford, 198 Neb. 376, 252 N. W. 2d 643. The appeal is from the finding pursuant to that hearing.

At the evidentiary hearing, the defendant, his wife, mother, sister, aunt, and the husband of his cousin testified that, prior to the defendant's arraignment, his attorneys had promised him a sentence of 3 to 15 years if he plead guilty to the charge of rape and a sentence of 50 years on each of the 5 charges against him if he did not. Defendant stated that he felt he would only have to serve 2 years. The attorneys who represented the defendant at his arraignment denied promising the defendant a 3 to 15 year sentence in return for his guilty plea. They testified that the defendant was fully advised of the terms of the plea bargain, i. e., a reduction of defendant's bond would not be opposed and the robbery and kidnapping charges dismissed. The attorneys testified that sentencing procedures were discussed with the defendant, but a specific sentence was not promised as part of the plea bargain.

The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion.

A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. See State v. Hall, 188 Neb. 130, 195 N. W. 2d 201. The requirement that a guilty plea

must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. See State v. Krider, 191 Neb. 285, 214 N. W. 2d 611.

The record here establishes that the defendant was represented by competent counsel throughout the original proceedings. The finding of the District Court that the defendant's plea of guilty was understandingly and voluntarily made and not induced by threats and promises is supported by the record.

The judgment of the District Court is affirmed.

Affirmed.

EXHIBIT L

IN THE DISTRICT COURT OF
DAKOTA COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

JESSE JAMES FORD,

Defendant.

Case No. 9107

JOURNAL ENTRY

NOW on this 27th day of July, 1977, this Court having heard evidence pertinent to Defendant's Motion for post conviction hearing on May 12, 1977, at which time the State of Nebraska was represented by Don A. Fitch, County Attorney of Dakota County, Nebraska and the Defendant appeared in person and with his attorney, Thomas A. Vakulskas. All parties appearing in open Court and evidence having been adduced and the matter taken under advisement, the Court now finds that there were no promises or threats made to the Defendant to obtain his plea to the charges. That the Defendant entered his plea to said charges voluntarily and understandingly, and that he was represented by competent counsel throughout the original proceedings. Therefore, motion for post conviction relief in this matter is denied.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion for Post Conviction Relief shall be and the same hereby is denied.

BY THE COURT:

/s/ Lloyd W. Kelly, Jr.
District Judge

EXHIBIT M

SUPREME COURT OF THE UNITED STATES

No. A-817

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE L. FORD

O R D E R

(Filed April 10, 1981)

UPON CONSIDERATION of the application of the Attorney General of Nebraska and the response filed thereto,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 80-1561, be, and the same is hereby, recalled and stayed pending the filing and disposition of a petition for a writ of certiorari. This order is conditioned upon the filing of said petition for a writ of certiorari on or before May 1, 1981. If the petition for a writ of certiorari is filed on or before May 1, 1981, this order shall remain in effect pending disposition of the petition. If the petition for a writ of certiorari is denied, this stay shall terminate automatically. Should the petition for a writ of certiorari be granted, this stay shall remain in effect pending the sending down of the judgment of this Court.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
Dated this 7th
day of April, 1981.

EXHIBIT N

No. 80-1816. Robert F. Parratt, Warden, Petitioner v. Jesse J. Ford, — U. S. —, 70 L. Ed. 2d 242, — S. Ct. — (October 19, 1981). On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Sumner v. Mata, 449 U. S. 539, 66 L. Ed. 2d 722, 101 S. Ct. 764 (1981).

Same case below, 638 F. 2d 1115.